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No. 99-964

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

STATE OF WASHINGTON,
Cross-Petitioner,

v.

DONALD RAY BUCHANAN,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the Washington Supreme Court

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

A. The Washington Supreme Court Followed *Minnesota v. Mille Lacs* and Prior Procedent of This Court Regarding The "Equal Footing" Doctrine.

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187 (1999), this Court reaffirmed that in order to abrogate Indian treaty rights, Congress must "clearly express its intent to do so." 119 S. Ct. at 1204, *citing United States v. Dion*, 476 U.S. 734, 738-740 (1986);[1] *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

> There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."

119 S. Ct. at 1204. The *Mille Lacs* Court found that because the Minnesota Enabling Act and its legislative history were silent regarding the Enabling Act's effect on Indian treaty rights, there was no "clear evidence" of congressional intent to abrogate the Chippewa Treaty rights. *Id.*

> [T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood. Treaty rights are not impliedly terminated upon statehood.

Id. at 1206.

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[1] Cross-Petitioner's assertion that *Dion* "dealt only with on-reservation hunting rights," Cross-Petition at 9, is not supported by the *Dion* Court's rationale, by the cases *Dion* relied upon, or by any subsequent caselaw.

As in the *Mille Lacs* case, the State[2] cannot point to language in the Washington Enabling Act or its legislative history to suggest that Congress intended to limit Indian treaty rights. The Washington Supreme Court followed *Mille Lacs*, contrasting the Washington Act with Wyoming's Enabling Act, examined in *Ward v. Race Horse*, 163 U.S. 504 (1895):

> Washington's enabling act, 25 Stat. 676 (1889), differs from the statute admitting Wyoming to the union, in that the statute admitting Washington reserves from Washington the right to control lands owned or held by any Indian or Indian tribe. 25 Stat. 676-77 (1889). This clause makes it clear that Congress had the Indians' treaty rights in mind when it created the State of Washington, but did not go on to expressly abrogate the treaty hunting rights.

App. to Petition at A28.

B. The Stevens Treaties Are Different From the Treaty Examined in *Race Horse*, So There is No Conflict.

Without any support from the language of the Stevens Treaties or treaty negotiations, Cross-Petitioner argues that the right to hunt in the Stevens Treaties was not intended by Congress to survive statehood. The only basis for this argument is that the language in the 1868 Crow Treaty, 15 Stat. 673, is somewhat similar.[3]

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[2] Although Cross-Petitioner, the Yakima County Prosecutor's Office, argued the "equal-footing" doctrine below, the Washington Attorney General's Office did not advance this argument in its amicus brief.

[3] As noted in *Mille Lacs*:

> [T]he State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction . . . [In Klamath] we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words.

119 S. Ct. at 1203.

The Crow Treaty examined in *Race Horse* restricted off-reservation tribal hunting to "the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." The *Race Horse* Court found that the parties intended the Crow Treaty right to continue only so long as the hunting grounds remained unoccupied and owned by the United States, and that the termination of these conditions was "clearly contemplated" when the Treaty was ratified. *Id.* at 509. The *Race Horse* Court's determination that the parties intended this treaty right to end when the United States gave away control of the Territory to a sovereign State, *id.* at 510, was based on the specific language of the Treaty, and on the circumstances surrounding its negotiation.

On the other hand, in *Tulee v. Washington*, 315 U.S. 681 (1942), this Court examined the Yakima Treaty of 1859 (one of the Stevens Treaties) to determine the "scope of the reserved rights of hunting and fishing." 315 U.S. at 684. The Court held that these off-reservation treaty rights were only subject to state regulations that were necessary for conservation. Justice Thomas, dissenting in *Mille Lacs*, noted:

> [The *Tulee Court's*] conclusion was driven by the language of the Treaty as well as the report of the Treaty negotiations and what it revealed to be the Yakima's understanding of the Treaty—to preserve their right "to hunt and fish in accordance with the immemorial customs of their tribes." *Id.* at 684.

119 S. Ct. at 1213.

In contrast to the Crow Treaty, the Stevens Treaties reserved the right of Washington tribes to hunt "on open and unclaimed lands" in accordance with their immemo-

rial customs. Although it was contemplated that these lands would diminish as settlement occurred, the treaty negotiations show that the parties intended this right to be an enduring one. *See, e.g.*, Petitioner's Reply Brief 1, n. 1; *State v. Chambers*, 81 Wn.2d 929, 935-936, 506 P.2d 311, 315 (1973).[4]

C. Washington's "Conservation Necessity" Standard Was Not Challenged Below.

Cross-Petitioner's challenge to the "conservation necessity" standard used by the Washington Supreme Court in *State v. Miller*, 102 Wn.2d 678, 689 P.2d 81 (1984), was not raised below, and should not be raised to this Court. *See Heckler v. Campbell*, 461 U.S. 458, 468-469, n.12 (1983). As noted below:

> The trial court entered a finding of fact . . . that the State had failed to sustain its burden of proving that the application of its regulations to Nooksack Indians or to Point Elliott Treaty hunters is necessary for conservation. The State did not assign error to this finding and, therefore, it is a verity on appeal. . . . The question of whether the State's regulations, which closed the hunting season, restricted the taking of antlered elk and established a winter feeding station,

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[4] Cross-Petitioner's argument that public forestlands are not "open and unclaimed" has been rejected by every reported decision to consider the issue. *E.g., Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967) ("unclaimed lands" within the Whitman National Forest); *United States v. Hicks*, 587 F. Supp. 1162, 1165 (W.D. Wash. 1984) (national forest lands are "open and unclaimed"); *State v. Miller*, 689 P.2d 81 (Wash. 1984) ("open and unclaimed" lands within Olympia National Forest); *State v. Stasso*, 563 P.2d 562 (Mont. 1977) ("open and unclaimed" lands within national forest); and *State v. Arthur*, 261 P.2d 135 (Idaho 1953) ("open and unclaimed lands" within Nez Perce National Forest).

> are necessary conservation measures is not properly before the court.

App. to Petition at A22-23.

Cross-Petitioner's arguments about the "conservation necessity" standard are overstated and ignore the benefits that cooperative State/Tribal management has provided for fisheries in Washington over the years. An extensive brief providing an overview of tribal management and co-operation regarding off-reservation hunting was filed before the Washington Supreme Court. *See* App. to Petition at A5-6.

The Washington Supreme Court's iteration of the "conservation necessity" standard in this case was taken from language in *Antoine v. Washington*, 420 U.S. 194, 207 (1975), and *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968). App. to Petition at A22. Cross-Petitioner is asking this Court to overturn established precedent, reaffirmed in *Mille Lacs*, on an issue that was not raised below.

CONCLUSION

For the reasons set forth above the Conditional Cross-Petition should be denied.

Respectfully submitted,

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